# Does It Matter Who Wrote It?: The Admissibility of Suspect Interrogation Record Written by Prosecutors[1)] in Korea

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**Abstract**

*The role of prosecutors in Korean criminal system has been changing very rapidly. The vast amount of discretion in terms of enforcing laws has not only been reserved for judges but prosecutors as well. As enforcers of justice, prosecutors had long enjoyed corroborative kinship with judges rather than having productive tension with them. The very existence of "Suspect Interrogation Record" had been one of the tokens proving the friendly relationship between judges and prosecutors. Suspect Interrogation Record is a fruit of the interrogation. At the end of the interrogation, the suspect is supposed to sign on a paper written by the interrogating authority. With the help of Suspect Interrogation Record, prosecutors have had easy time getting convictions. As the dynamics between judges and prosecutors changes, the Record does not have the strong presence in Korean criminal trials anymore. This article endeavors the issue of the changing dynamics centering around Suspect Interrogation Record to see how the discussion the Record has evolved over the years.*

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1) Section 1 of Article 312 of Korean Criminal Procedure Act (KCPA) [*hyeongsasosongbeop*] (Law No. 341, Sept 23, 1954, last revised March 31, 2005 as Law No. 7427) [*hereinafter* "KCPA"] terms it as "A protocol which contains a statement of a suspect or of any other person, prepared by a public prosecutor."

# I. Introduction

> Allowing defense counsel to cross-examine the testimony of prosecution witnesses was one of two great initiatives taken by the bench to enhance the reliability of the evidence in eighteenth-century criminal trials. The other response to the dangers that emerged from prosecutorial practice in this period was to devise rules of evidence that excluded certain problematic types of proof.[2)]

Following the examples established by many other civil law countries,[3)] Korea has had a tradition of treating rules of evidence as a small part of criminal procedure.[4)] Some countries prefer to position the evidence rules in civil law status and some in common law status.[5)] Although it is obvious that Korea is one of civil law countries, heavily relying upon judges' discretionary power, it was implicitly noted that a lot of detailed aspects of evidentiary rules were considered better if they were unwritten because those aspects were assumed to be left to judges who would decide when the matters will reach the bench.

In Korea, the vast amount of discretion in terms of enforcing laws has not only been reserved for judges but for prosecutors as well. As enforcers of justice, prosecutors had long enjoyed corroborative kinship with judges rather than having productive tension with them. It would not be exaggerating to say that oftentimes judges helped prosecutors to prove their cases. Geared to work as supporting partners to prove prosecutions, judges were not exactly impartial umpires.

The very existence and usage of "Suspect Interrogation Record"[6)] had been one of the tokens that prove the friendly relationship between judges and prosecutors. With

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2) John H. Langbein, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 178 (Oxford University Press: 2003) [*hereinafter* LANGBEIN].

3) *See generally* SANG HYUN SONG, INTRODUCTION TO LAW AND LEGAL SYSTEM OF KOREA (1983).

4) There are no separate rules of evidence in Korea. The evidentiary rules are a part of KCPA. Article 307 throughout Article 318-3.

5) Yong Chul Park, *Devising a Korean Adversarial System Using Thoroughly Detailed Evidentiary Rules*, JSD Dissertation 137 (January 2006). [*hereinafter* PARK].

6) Article 312(Protocol Prepared by Public Prosecutor or Judicial Police Officer) of the KCPA defines "Suspect Interrogation Record" as "A protocol which contains a statement of a suspect or of any other person, prepared by a public prosecutor." Since the definition itself is not clear enough to inform readers what the Protocol means, I use "Suspect Interrogation Record" instead.

the help of Suspect Interrogation Record, prosecutors have had easy time getting convictions. Then, what is so called "Suspect Interrogation Record"? Before anyone is being formally charged with a certain crime, he/she holds a status as a suspect under any sort of investigation.[7] Suspects, once they are in the custody of interrogating authority such as the police and the prosecutions, will be under "direct" interrogation by either investigating authority. Suspect Interrogation Record is a fruit of the interrogation. At the end of the interrogation, the suspect is supposed to sign on a paper written by the interrogating authority. Here, the meaning of "direct" interrogation is that the suspect would be left alone with virtually no assistance of counsel for questioning. You might wonder how such sort of practice could be possible in Korea where the right to counsel is constitutionally guaranteed.[8] The key to understand this awkward reality is that regardless of attorney presence during interrogation, the counsel is not allowed to interfere.[9] The object for interrogation is the defendant, not the counsel. Therefore in effect, Suspect Interrogation Record, in nature, has worked as a record of confession elicited without ample assistance of counsel. Suspect Interrogation Record became such a crucial tool for the prosecution to have a guilty verdict.

Consequently, it is not a surprise that one of the most crucial features of Korean evidentiary rules is that those rules revolve around a protocol called Suspect Interrogation Record. Basically, Suspect Interrogation Record is hearsay evidence, because firstly it fits virtually every aspect of the definition of hearsay although the definition only accords with commonly acceptable one of hearsay in the United States.[10] That is, the Federal Rules of Evidence of the United States (the FRE) provides that hearsay is "a statement,[11] other than one made by the declarant[12] while

7) PARK, *supra* note 5 at 139.

8) Section 4 of Article 12 of Constitution of the Republic of Korea [*heonbeop*] provides:

(4) Any person who is arrested or detained shall have the right to prompt assistance of counsel. When a criminal defendant is unable to secure counsel by his own efforts, the State shall assign counsel for the defendant as prescribed by Act..

9) Jin-Yeon, Chung, *Constitutional Contents and Limits to the Right of Counsel — With Special Reference to Interrogation of Suspect and Presence of Counsel*, SUNGKYUNKWAN LAW REVIEW, Volume 18-3, at 644-645 (2006).

10) A prominent prosecutor argues that any out-of-court statement against interest by the accused can be admissible as an exception to hearsay in the United States (Wan Kyu Lee, *The History and the Future of Evidentiary Rules in the Korean Criminal Procedure Act*, The 50th Anniversary Conference for Korean Criminal Law Association (2007), at 134) Obviously, such argument is flawed because only some of out-of-court statements against interest by the accused can be found admissible as long as it fits specific exceptions to hearsay.

testifying at the trial or hearing, to prove the truth of the matter asserted." Still, the KCPA does not tell what hearsay means in Korea. However, considering where Suspect Interrogation Record sits, there should not be any doubt that the Record is a hearsay.

Because of the strong presence of Suspect Interrogation Record in Korean criminal trials, there could be a big chance that many wrongful convictions, if any, were made based upon the defendant's own confession to a crime he/she did not commit. Such possibility of wrong conviction should not be overlooked and the history did not respond to leave provisions on Suspect Interrogation Record intact. This article endeavors to issue the changing dynamics centered around Suspect Interrogation Record to see how the discussion regarding the Record has evolved.

## II. History toward Progression

As mentioned before, arguably Suspect Interrogation Record has been in the center of evidentiary rules partially because the matter is inevitably intertwined with hearsay evidence in the KCPA. Also, the Record had continued to give an edge to the prosecutions, because the function of it was a record of confession made while there was no presence of attorney. However, the existence of the Record faced many challenges and these challenges result in changes. The change in the KCPA regarding Suspect Interrogation Record started from the Korean Supreme Court's taking a different position on that. From a different perspective, the historic shift toward having adversarial court system has forced the court to rethink their perspective on Suspect Interrogation Record over the years.

In this chapter, firstly I want to address the past in terms of law and court decisions on the Record. Secondly, how the transformation in court decision affected the changes in law will be explained. Thirdly, I hope to conclude this chapter by talking about some issues left to be desired for the future resolution.

11) FED. R. EVID 801(a) provides that a "statement" is (1) oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

12) FED. R. EVID 801(b) provides that a "declarant" is a person who makes a statement.

## *1. It Really Mattered Who Wrote It*

### 1) Law Was Different Depending upon Who Wrote It

As noted, the admissibility of the Record was quite different depending upon who performed the interrogation.[13] The Section 1 of Article 312 of KCPA[14] provides that "a protocol which contains a statement of a suspect …, prepared by a public prosecutor" may be admissible in court, if the suspect — then the accused acknowledged the genuineness of the Record "at a preparatory hearing or during the public trial" The Section continues saying that in case of the protocol is written by a public prosecutor, even if the defendant does not acknowledge or verify the genuineness of the statement "at a preparatory hearing or during the public trial" as long as there are "circumstances where the statement was made under such circumstances that is undoubtfully believed to be true" the statement would be admissible. It is believed that "such circumstances that is undoubtfully believed to be true" is equivalent to "special indicia of reliability" in the United States. That is, the KCPA cut a prosecutor some slack by providing a way to admit the Record prepared by her when the accused does not want the Record to be used in trial. However, still a lot of lingering questions would remain. What does it mean by "verification of genuineness of the statement"? What kind of accused would be willing to do such verification or acknowledgement? How can a public prosecutor prove that there is

13) *See generally* Kuk Cho, *The Admissibility and Verification of Genuineness of an Interrogation of a Suspect Made by Prosecutors — Confirmation of Prosecutorial Justice by Courts*, CRIMINAL CASE STUDY Vol. 9, THE KOREAN CRIMINAL CASE STUDY SOCIETY, PARKYOUNGSA (2001).

14) Article 312 (Protocol Prepared by Public Prosecutor or Judicial Police Officer) of the KCPA provides:

(1) A protocol which contains a statement of a suspect or of any other person, prepared by a public prosecutor, or a protocol containing the result of inspection of evidence, prepared by a public prosecutor or judicial police officer, may be introduced into evidence, if the genuineness thereof is established by the person making the original statement at a preparatory hearing or during the public trial: Provided, That a protocol containing the statement of the defendant who has been a suspect may be introduced into evidence only where the statement was made under such circumstances that it is undoubtfully believed to be true, regardless of the statement made at a preparatory hearing or during public trial by the defendant.

(2) A protocol containing interrogation of a suspect prepared by investigation authorities other than a public prosecutor may be used as evidence, only in case where the defendant who has been a suspect, or the defense counsel at a preparatory hearing or during public trial verifies the contents of the protocol

[This Article Wholly Amended by Act No. 705, Sep. 1, 1961].

"special indicia or reliability" in the Record when the accused denies the genuineness of the Record?[15)]

So far we have observed how the Record made by prosecutors was treated in the court, then what about Suspect Interrogation Report written by the police? Section 2 of Article 312 of the KCPA[16)] provides that unless the accused does "verify the content of the protocol" such statement would never be admissible. In other words, there is no "special indicia of reliability" leeway where such statement can be found to be admissible in case the accused refuses to verify the content. Also, the verification should amount to admit the fact that the content of the Protocol was consistent with her intention. "Verifying the content" is a much stronger word than just acknowledging the genuineness of the statement provided in Section 1 of Article of KCP which was applied to the Record written by the prosecution. What would be the justifying explanation for such discrepancy between the Record written by the prosecution and by the police? The reason of differentiating the level of admitting the Record seems to be stemming out of the prosecutors' superior status to the police.[17)] Also, one convincing argument for the difference was that prosecutors are obliged to be objective pursuant to the law[18)] therefore they are more trustworthy than the police in terms of not committing to any illegal means to elicit confession.[19)]

15) I try to answer to these questions in the later section of this Article.

16) Article 312 of the KCPA, *supra* note at 14.

17) Section 1 of Article 196 of the KCPA provides:

(1) Investigators, police administrative officials, police superintendents, police captains or police lieutenants shall investigate crimes as judicial police officers under instructions of a public prosecutor.

Also, Section 1 of Article 4 of Public Prosecutor's Office Act provides:

(1) The public prosecutors shall have the following duties and authority as representatives of the public interest:

2. The direction and supervision of judicial police officials with respect to the investigation of crimes.

Professor Kuk Cho explains; "The investigative authorities are composed of two bodies. First, police are a subsidiary organ of the prosecution, lacking independent powers of investigation." (Kuk Cho, *The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea*, 30 DENV. J. INT'L. & POL'Y 377, 381 (Summer, 2002) [*hereinafter* CHO 1].

18) Section 2 of Article 4 of Public Prosecutor's Office Act provides:

(2) In performing his duties, the public prosecutor shall observe political neutrality as a servant of the people and shall not abuse the powers bestowed upon him <Newly Inserted by Act No. 5263, Jan 13, 1997>.

19) See CHO 1, *supra* note at 17.

#### 2) Acknowledging the Genuineness of the Record

There had been two ways of interpreting the acknowledgment of the genuineness of the Record provided in Section 1 of Article 312 of the KCPA, which was reserved only for the Record written by a prosecutor. The first one is so called "formal acknowledgment" where the defendant admits the fact that she signed the Record at the end of interrogation. The second one is referred to as "substantial acknowledgment" where the defendant verifies the content of the Record. The Supreme Court of Korea had been very firm in upholding a presumptive position in this acknowledgement area. That is, once formal acknowledgement was made by the defendant then substantial acknowledgment is presumed to have been made as well.[20] Such theory of presumption was another way of giving leeway to the prosecutions, because formal acknowledgement was easy to obtain as long as the signature of the accused was on the Record.

On the other hand, pursuant to section 2 of Article 312 of the KCPA, to be able to admit Suspect Interrogation Record written by the police, the accused needs to do substantial acknowledgment. That is, the weight of admissibility was different depending upon who was the writer of the Record. It is common sense that no accused would be willing to give substantial acknowledgement for Suspect Interrogation Record written by the police. For that reason, in order to avoid any expected danger of Suspect Interrogation Record being excluded because it lacks admissibility due to the refusal from the defendant in terms of verifying the content of the Record, same interrogation had to be redone by prosecutors. Such tradition caused unnecessary workload for the prosecutors to redo all the interrogation process just to make another Suspect Interrogation Record by her.

### *2. New Chapter of Suspect Interrogation Record*

#### 1) The Change in Holdings

Abovementioned, in terms of having two-tier system — formal and substantial

20) Decision of Jun. 26, 1984, 84 Do 748 (Korean Supreme Court); Decision of Jun. 23, 1992, 92 Do 769 (Korean Supreme Court); Decision of May. 12, 1995, 95 Do 484 (Korean Supreme Court); Decision of Jul. 28, 2000, 2000 Do 2617 (Korean Supreme Court).

acknowledgment — with respect to verifying "the genuineness of the statement, as the close tie between the prosecutions and the court has been estranged or the Korean society has become more interested in approaching adversarial court system depending upon how people see it, the court's firm stance on presumptive theory on Suspect Interrogation Record, which had been heavily criticized, began to soften up.

Finally, the Korean Supreme Court came down with a ruling[21] that even in a case of Suspect Interrogation Record written by a prosecutor, substantial acknowledgment by the accused is necessary to be able to admit such Record. With such ruling, the Court practically found that the Record written by a prosecutor would hold the same status as of the Record by the police. The change in a Supreme Court' ruling startled the prosecutor's office as well as subordinate courts because it practically meant that it became much easier for the defendant to wipe out the admissibility of the Record by simply refusing to verify the content of it. The inevitable discrepancy between the Court decision and the law demanded changes in the KCPA.

### 2) The Advent of New Criminal Procedure

In October 2003, Committee on Judicial Reform was established in the Supreme Court to revolutionize the legal system in Korea.[22] The baton for judicial reform was passed onto Presidential Committee on Judicial Reform, which was formed in January 2004.[23] A part of effort the Committee was committed to make was to change the law on Suspect Interrogation Record written by a prosecutor. The Committee recommended a new revolutionary measure which excludes the admissibility of Suspect Interrogation Record. However, this attempt faced a fierce resistance from the Prosecutors' office and finally was rejected.

As a result, only a few changes regarding Suspect Interrogation Record being reflected in the review process, the new Korean Criminal Procedure Act was passed in the National Assembly of the Republic of Korea on April 30th, 2007. The new Section 1 of Article 312 of the KCPA confirms that there should be substantial acknowledgment to be able to admit Suspect Interrogation Record written by a

21) Decision of Dec. 16, 2004, 2002 Do 537 (Korean Supreme Court).

22) For information regarding history and activities of Presidential Committee on Judicial Reform, available at http://www.pcjr.go.kr/about008.asp (last visited Sep. 15, 2007).

23) *Id.*

prosecutor. The new Section 2 of Article 312 of the KCPA continues to provide that one way of proving substantial acknowledgment in case the accused refuses to acknowledge the genuineness of content is by using videotapes which filmed the interrogation process.

### *3. Unfinished Business*

In this chapter I want to address the issues which should be discussed and made to become real in the near future. Although the new version of the KCPA changes many aspects of evidentiary rules including Suspect Interrogation Record, it leaves much room for improvement.

#### 1) Special Indicia of Reliability

Although the new KCPA reaffirms that the substantial acknowledgment is necessary for Suspect Interrogation Record written both by the prosecutions and by the police, proving special indicia of reliability, which is the next step of making admissibility decision, is still being left for interpretation. The Constitutional Court of Korea found that special indicia of reliability requirement in regard to Suspect Interrogation Record is constitutional, although some minority opinion added that there should be clarity in terms of how to prove special indicia of reliability.[24] The new KCPA leaves much to be desired in that regard. It merely suggests that videotaping of the interrogation would be able to work as the means of proving that there was genuine acknowledgment by the accused during interrogation. At the end, special indicia of reliability decision are still being left to judges to make, which I think a remnant of inquisitorial court system.

#### 2) Need of Defense Lawyer Presence

Abovementioned, lawyer's presence can be meaningful only when she can actually defend the client. At the moment, the role of defense lawyer is minimal. Although the newly made Section 1 of Article 243-2 of the KCPA provides that a

24) Decision of May 26, 2005, 2003 Hun-Ka 7 (Korean Constitutional Court)

lawyer can be present when the law enforcement interrogate suspects, the Section 3 of same Article only goes on to say that the lawyer participating in the interrogation is able to object when the interrogation method is unjust and she can opine upon the approval of the law enforcement personnel such as a police officer or a prosecutor.

It is true that you can hardly expect to be perfect from the outset. However, the fact that a defense lawyer cannot function as a direct channel for interrogation leaves a room for improvement. To be able to achieve the true meaning of assistance of counsel and presumption of innocence, the interrogation and questioning should be addressed to the counsel, not to the suspect. The law should be made toward that direction in the near future.

### 3) Is Suspect Interrogation Record Truly Necessary?

Originally, the members of Presidential Committee on Judicial Reform intended to wipe out the existence of Suspect Interrogation Record, because as mentioned above, they saw the Record obviously outweigh the demand for the right for fair trial bestowed to the accused.[25] Although they failed to do so due to strong resistance from prosecutors, the attempt has led to a discussion that the Record itself is now useless because videotaped interrogation can be used to verify the content of Record pursuant to new Section 2 of Article 312 of the KCPA.

On the other hand, there might be no objection in admitting the Record as long as the right to counsel is being strictly guaranteed during suspect interrogation. If this were reality, the Record would not be such an attractive tool for the prosecutions to prove their cases because confession would not be elicited easily. Also, to begin with, confession should not be a vital form for getting convictions. That is, testimonial evidence such as the Record should not have too much weight in proving cases. Rather, real evidence such as DNA evidence, fingerprints, weapons used for the charged offense should be given more weight. Arguably, that will give a better chance for the defense to have a fair trial. In addition, as jury system will be in place for certain cases where the defendant want to have a jury trial,[26] Suspect

25) For information regarding discussion on admissibility of Suspect Interrogation Record written by a prosecutor, available at http://news.naver.com/news/read.php?mode=LSD&office_id=086&article_id=0000021131&section_id=102&menu_id=102 (last visited Sep. 27, 2007).

26) For the information on jury trial in Korea and the recent mock trial, available at http://service.joins.

Interrogation Record might not be a positive tool for the defendant. That gives one more reason that the Record should be gone out of the window in the near future.

#### 4) Lack of Hearsay Provisions

Although the revised version of KCPA was a great attempt to transform the criminal court in Korea, it lacks many provisions on evidentiary rules. Specifically speaking, the new KCPA hardly adds any additional exceptions to hearsay.[27] Even if it would be nearly impossible to elaborate exceptions as the Federal Rules of Evidence in the United States do given the fact that there has not been any historical background on hearsay, a meaningful attempt for equipping the evidentiary rules with hearsay exceptions would be necessary. This matter needs to draw more attention in the near future.

## III. Conclusion

Giving a special treatment for Suspect Interrogation Record written by a prosecutor is a relic of inquisitorial system where judges and prosecutors work as one set in criminal justice system. However, the history of Record shows how court decisions affect the change in law even in a civil law country. The change was not made independently from how the society desires the way criminal justice system should work. Also, the judicial reform does not happen overnight. The change regarding the admissibility of Suspect Interrogation Record written by a prosecutor was the first step toward having a true adversarial system where the right of the accused can be guaranteed in more meaningful way. People's desire to have fairer criminal justice system will be fulfilled when both the prosecutions and the defense share level playing field.

KEY WORD: Suspect Interrogation Record, Special Indicia of Reliability, Formal Acknowledgment, Substantial Acknowledgment, Hearsay

com/news_asp/mt_article.asp?aid=2007091019173118876 (last visited on Sep. 28, 2007).

27) The only one added exception to hearsay is Section 2 of Article 318-2, where a videotaped interrogation of the accused or any other witness can be used to refresh his/her recollection for the matter. One limitation in using such a videotape is that tape should be shown only to the person who was filmed: it cannot be used to show anyone else.